

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC. APPLICATION No 6906 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the concerned : NO
Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals?

VIJAY B THAKKAR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Misc.Application No. 6906 of 2000
MR PJ KANABAR for Petitioner Nos. 1-2
MS. NANDINI JOSHI APP for Respondent Nos. 1 and 2
MR MM TIRMIZI for Respondent No. 3
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CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date of decision:26/09/2003

ORAL JUDGEMENT

1. By filing instant petition under Article 226 of
the Constitution, petitioners, against whom crime is
registered vide C.R.No.23 of 2000 on 2.2.2000 with

Kapodra Police Station for commission of the alleged offences under Sections 420, 483, 484, 485, 487 and 488 of the Indian Penal Code ('the IPC' for short) read with Section 135 of Trade and Merchandise Marks Act, 1958 ('the Act' for short) have prayed

- (a) to issue a writ of prohibition or a writ, order or direction in the nature of prohibition prohibiting the respondents from proceeding with criminal case initiated by the impugned complaint at Annexure A to the petition;
- (b) to issue a writ of certiorari or a writ, order or direction in the nature of certiorari quashing the proceedings of the impugned complaint at Annexure A to the petition together with the consequential seizure of machineries, etc., and the restrictive orders at Annexures B and D respectively to the petition; and
- (c) to issue a writ of mandamus or any other appropriate writ, order or direction directing the respondents to pay the petitioners the sum of Rs.5 lacs or an appropriate amount as thought fit and adequate by the Court by way of compensation for filing vexatious and malicious complaint against the petitioners.

2. The petitioners (accused in the complaint) are manufacturing and selling Meetha Masala in the State of Gujarat with a brand name "Pepsi Cola". Respondent No.3 ('the complainant' for short) is manufacturing Meetha Masala in Maharashtra with a brand name "Pensi Cola". The complainant has filed a complaint against the petitioners wherein it is alleged that the petitioners are manufacturing duplicate Meetha Masala in the city of Surat which is of inferior quality to the product of the complainant and are being sold in the market at equivalent price of his product. It is further alleged in the complaint that the petitioners do not have any permission from the State Government or Small Industrial Organisation to do the said business. It is also alleged that the petitioners have misused the name of the complainant and his trade mark and have sold duplicate materials of inferior quality to the people at large without paying any tax to the Government and have earned benefit.

2.1. The aforesaid complaint is filed at Kapodra Police Station where it is registered vide CR No.23 of 2000. On registration of the said complaint, respondent No.2, i.e., Police Inspector of Kapodra Police Station, Surat ("the PI" for short) started investigation. During the course of investigation, business premises of the

petitioners at village Saroli were ransacked and all the machineries, raw materials and all other materials of their aforesaid business were seized and they are lying at Kapodra Police Station at present as muddamal of the said case. The petitioners were also arrested and produced before the learned Judicial Magistrate, First Class, Surat on 3.2.2000 and remand was sought for. The learned Magistrate granted remand for a day. Thereafter the petitioners applied for bail before the Sessions Court, Surat and the learned Additional Sessions Judge, Surat released the petitioners on bail, subject to certain conditions, vide order dated 28.2.2000.

3. By filing this petition, the petitioners have contended that they are victims of a malignant attack of the complainant in collusion with the PI of Kapodra Police Station which has ruined them and their business of manufacturing of Pan Masala in Surat City. According to the petitioners, the complainant is also indulged in the same business and, therefore, with a view to get the business of the petitioners stopped, the complainant lodged a false complaint before Kapodra Police Station by making false statement that he possesses a trade mark named as "Pepsi Cola Pan Masala".

3.1. According to the petitioners, the PI has no authority under the law to take cognizance of any of the so-called offences alleged against the petitioners. In spite of that he has not only taken cognizance of the offences and on the day of lodging of the complaint, arrested the petitioners and made search at their premises and seized raw-materials and machineries, etc., of the petitioners.

3.2. It is the case of the petitioners that if one reads the complaint without adding or subtracting anything therefrom, there is no allegation about commission of offence under section 420 of the IPC. So far as offences under sections 483, 484, 485, 487 and 488 of IPC are concerned, they are non-cognizable. Therefore, the complainant joined hands with the PI to take revenge and to get the business of his rival business party i.e., the petitioners, stopped, the PI added Section 420 of IPC in the complaint. By adding Section 420 in the complaint, the PI has made the offence as cognizable. Therefore, it is the case of the petitioners that the PI, in collusion with the complainant, has recorded a false complaint.

3.3. According to the petitioners, it is a settled legal position that so far as non-cognizable offences are

concerned, there is a bar under Section 155 of the Code of Criminal Procedure ('the Code' for short) which provides that no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. Notwithstanding the statutory bar contained in Section 155 of the Code, PI has not only registered the offences but also started investigation, arrested the accused and seized the articles belonging to the petitioners as muddamal.

3.4. It is also asserted by the petitioners that so-called trade mark of the complainant "Pepsi Cola Meetha Masala" is not registered before the Registrar of Trade Marks and Merchandise. However, the PI, in collusion with the complainant, for extraneous reasons, acted upon the complaint of the complainant against the petitioners and attacked their person and property as well. It is also emphatically submitted that on bare reading of the complaint it is clear that no offence under section 420 can be said to be made out. According to the petitioners, the complaint is based on a false statement made by the complainant to the effect that he is having the trade mark "Pepsi Cola Meetha Masala" registered in his name. It appears from the record that the complainant has applied for the registration of trade mark to the Mumbai Office under the Act. That the office of the Registrar of Trade Marks, Mumbai, on the contrary, made it clear to the complainant while passing the receipt of the aforesaid application that passing of the receipt of making the application should not be mistaken for acceptance of registration of the trade mark. It is further informed that the use of word "registered" or letter 'R' in circle till the mark is registered is an offence under Section 81 of the Act. It is also emphatically averred by the petitioners that on the pouch of the Meetha Masala, which is a product of the complainant, by no means there is any mark to suggest about any trade mark of the complainant. The complainant sells the pouch in a box containing 40 pouches and upon the said box the complainant mentions the name of product as "Pensi Cola". According to the petitioners, making of false representation of registered trade mark itself is an offence under Section 81 of the Act. Therefore, the complainant in fact is an offender having committed the said offence by lodging the false complaint against the petitioners by wrongly representing the fact of having a registered trade mark. According to the petitioners, the complainant has no right or authority to say that the material of the petitioners is of inferior quality.

3.5. It is also asserted that the complaint lodged by the complainant with Kapodra Police Station against the petitioners is with an ulterior motive and to wreck business rivalry. Therefore the whole exercise undertaken by the PI on the impugned complaint is illegal, high-handed, arbitrary, unauthorised, malafide and motivated on account of extraneous consideration and hence the same requires to be quashed and set aside forthwith. The petitioners, therefore, filed this petition and claimed the reliefs to which reference is made earlier.

4. It is relevant to notice that no reply affidavit is filed by the complainant controverting the averments made in the petition and, therefore, the averments made in the petition go unchallenged.

5. Mr. P.J. Kanabar, learned advocate for the petitioners, contended that there is no prima facie case against the petitioners for commission of the alleged offence under section 420 of the IPC which is a cognizable offence. The complaint itself demonstrates that there is no whisper of allegation that the petitioners have committed offence under Section 420 of the IPC. According to him, so far as offences under sections 483, 484, 485, 487 and 488 of IPC are concerned, they are non-cognizable offences. There is an embargo under Section 155 of the Code to the effect that no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. Therefore, the complainant in collusion with the PI made an ingenious device to book the petitioners, added Section 420 of IPC so that the police officer does not have to obtain prior order of the Magistrate for investigating the complaint filed by the complainant. It is also emphasised by the petitioners that the averments made in the petition are eloquent and speak volumes of nondisclosure of offences. According to him, the complainant's so-called trade mark "Pepsi Cola" or "Pensi Cola" is not registered. However, he made a false statement before the PI that his trade mark is registered and therefore the complainant himself has committed an offence under section 81 of the Act. In fact the complainant has not stated anything as to what are the offences committed by the petitioners under the Act. The complainant has only mentioned Sections 483, 484, 485, 487 and 488 of the IPC which are not in relation to trade mark but they are in relation to property mark. There is a difference between trade mark and property mark. Even for proving the offence under Section 483 of the IPC, the complainant has to prove that

'Pepsi Cola' is his property mark. It is also asserted by the learned advocate that for the offences under sections 483, 484, 485, 487 and 488 the complainant ought to have filed complaint before the learned Judicial Magistrate, First Class as the said offences are non-cognizable. But the main purpose of the complainant was to ruin the business of the petitioners on account of business rivalry and therefore he joined hands with the PI and filed the frivolous and false complaint for non-cognizable offences but PI has taken cognizance of the complaint by adding offence under Section 420 of the IPC, which is illegal and bad in law.

6. In support of the aforesaid contentions, Mr. Kanabar has relied upon the following decisions:

- (i) Avinash Madhukar Mukhedkar v. The State of Maharashtra, 1983 Cri.LJ 1833.
- (ii) Brundaban Sahu v. B. Rajendra Subudhi, AIR 1986 Orissa 210.
- (iii) Syed Kaleem v. M/s. Mysore Lakshmi Beedi Works and another, 1993 Cri.L.J. 232.
- (iv) Zahir Ahmed v. Azam Khan, 1996 Cri.L.J. 290.
- (v) Mustan Patel v. State of West Bengal and others, 2002 (25) PTC 451 (Cal).

7. According to the petitioners, the crime registered against them on the basis of the complaint filed by the complainant for commission of the alleged offences is void ab-initio and bad in law and deserves to be quashed and set aside. It is therefore urged to quash and set aside the crime registered against them being CR No.23 of 2000 with Kapodra Police Station.

8. Ms. Nandini Joshi, learned APP for respondent Nos.1 and 2 and Mr. MM Tirmizi, learned advocate for the complainant have opposed the prayers made in the petition by contending that reading of the complaint as a whole, prima facie case is made out disclosing the ingredients of the offence under Section 420 of the IPC. They therefore contended that the complaint has to be examined as a whole without going into merits of the allegations made therein. According to them, whatever averments are made in the memo of petition they are in the nature of defence which cannot be considered in a petition filed under Article 226 of the Constitution as the same can be considered at the time of trial and it is too premature to judge the defence before the same is laid and probalised. Therefore, according to them, there is no substance in the challenge made in the petition and the PI has rightly registered offences and investigated the

case and hence the petition deserves to be rejected and therefore they urged to reject the petition.

9. I have considered the submissions advanced by the learned advocates appearing for the parties. I have also perused the averments made in the petition which are stated on oath and the decisions cited at the Bar.

10. From the record of the case and from the FIR No. 23/2000 lodged by the complainant against the petitioners for the commission of the alleged offences, it is evident that both the petitioners and the complainant are dealing in manufacturing and selling of Meetha Masala in the name of "Pepsi Cola" or "Pensi Cola". The complainant is manufacturing Meetha Masala and is having manufacturing unit at Nasik whereas the petitioners have their manufacturing Unit at Saroli village, Surat. It is also evident that the complainant's factory is registered in the year 1998. His product - Meetha Masala in the name of "Pepsi Cola" or "Pensi Cola" has never been registered before the Registrar of Trade Marks. However, under the pretext that his trade mark is registered, the FIR came to be lodged at Kapodra Police Station by the complainant, wherein, it is, inter alia, alleged that the complainant is having trade mark of his product Meetha Masala registered whereas the petitioners have not registered their trade mark. It is also alleged in the said FIR that the petitioners are manufacturing duplicate Meetha Masala which is of inferior quality to his product and are being sold in the market at equivalent price of his product. It is also alleged in the complaint that the petitioners do not have any permission from the State Government or Small Industrial Organisation. It is also alleged in the said complaint that the petitioners have misused the name of the complainant and his Trade Mark and have sold duplicate materials of inferior quality to the people at large and without paying any tax to the Government have earned profit and, therefore, on the basis of the said information supplied by the complainant to Kapodra Police Station, the FIR came to be registered for non-cognizable offences vide CR No.23 of 2000 for commission of alleged offences under sections 420, 483, 484, 485, 487 and 488 of the IPC and section 135 of the Act. Not only that, pursuant to registration of the FIR, the petitioners were apprehended and brought before the Magistrate for remand and remand for one day was sought for which was granted and thereafter the petitioners have been enlarged on regular bail by the learned Additional Sessions Judge, Surat.

11. In the aforesaid back drop of the factual

aspects, now the question that arises for consideration of this Court is whether the complaint which is filed by the complainant is for breach of the Trade Mark or for commission of the offences under the IPC? On having perusal of the FIR, it is clear that the complaint is filed for commission of the offences under IPC and not for the offences under the Act. Though as per the narration made in the complaint it appears that the petitioners have committed offences under the Act, in fact, the complaint is filed for the alleged offences under the IPC.

12. Sections 482, 483 and 485 have been amended in view of Section 135 of the Act and accordingly the offences of "Counterfeiting of Trade Mark" by omitting the word 'trade mark' is made applicable to a property mark. The special legislation thus since is enacted by the Act the offences of counterfeiting relating to trade marks are made punishable as per Sections 78 and 79 and others of the Act. On having perusal of the impugned FIR, all the offences mentioned therein except offence under section 420 of IPC are non-cognizable. The offences under sections 78 and 769 are more or less similar to Section 483 of IPC which are non-cognizable. Therefore, this Court is of the view that registration of the FIR for commission of the alleged offences under sections 483, 484, 485, 487 and 488 of IPC are illegal and unauthorised in view of the embargo placed under Section 155 of the Code.

13. Section 155 of the Code is in relation to information as to non-cognizable cases and investigation of such cases. According to the provisions of the said Section, when information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer the information to the Magistrate. It further provides that no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. As mentioned hereinabove, offences under Sections 483, 484, 485, 487 and 488 are non-cognizable and, therefore, the PI has wrongly registered the offences under those sections and started investigation without obtaining prior order from the Magistrate having power to try such case or commit the case for trial. The PI has not only wrongly registered the FIR and started investigation but raided the premises of the petitioners

and also recovered the machineries together with other articles as Muddamal, which in the opinion of this Court, is dehors the provisions contained in Section 155 of the Code.

14. In the case of Avinash Madhukar Mukhedkar (supra), an offence was registered under section 124 of the Bombay Police Act and police started investigation without obtaining prior order of the Magistrate as defined in Section 155 (2) of the Code. The Bombay High Court has ruled that offence under Section 124 of the Bombay Police Act is a non-cognizable offence and, therefore, investigation without obtaining prior order of the Magistrate under section 155 (2) of the Code is illegal and therefore the prosecution was quashed.

15. In view of the statutory provisions contained in section 155 of the Code and the ratio laid down by the Bombay High Court in the above referred to judgment to the facts of the present case, there is no manner of doubt that all the offences under sections 483, 484, 485, 487 and 488 are non-cognizable offences. However, the PI has registered the FIR for the said offences and therefore the FIR deserves to be quashed.

16. In the complaint there is no whisper as to which is the property mark belonged to the complainant. There is no Copy Right in favour of the complainant with regard to the wrapper of Meetha Masala. So far as the alleged offence under Section 484 of the IPC is concerned, it is an offence of counterfeiting the mark used by a public servant. In the complaint it is nowhere stated that Meetha Masala Pepsi Cola is a property mark of any public servant or the complainant is a public servant. Therefore, the offence under section 484 of IPC mentioned in the impugned FIR is misconceived and it suggests total non-application of mind on the part of the police officer concerned.

17. As the offences under Sections 483, 484, 485, 487 and 488 of the IPC are non-cognizable, there is no manner of doubt that the impugned FIR could not have been registered for the said offences without the prior permission of the learned Magistrate having power to try such case or commit the case for trial in view of the bar contained in Section 155 of the Code, now the next question falls for consideration of this Court is as to whether reading the complaint as a whole, offence under Section 420 of the IPC, as alleged in the complaint, is made out against the petitioners? In order to answer the said question, we have to find out as to what are the

ingredients to constitute an offence under Section 420 of the IPC.

18. To constitute an offence under Section 420 of the IPC, the prosecution must prove that the accused have dishonestly induced any person to do the following:

- (a) to deliver any property to any person, or
- (b) to consent that any person shall retain any property, or
- (c) to make, alter or destroy the whole or any part of a valuable security, or
- (d) to make, alter or destroy anything which is signed or sealed and which is capable of being converted into a valuable security.

19. This court fails to understand how can it be said that the petitioners have committed an offence under Section 420 of IPC even if we accept that the petitioners are manufacturing and selling the similar goods manufactured and sold by the complainant. Reading the FIR as a whole, none of the ingredients which are required to constitute offence under Section 420 is present. Perusal of the material available from the FIR as a whole, this court does not find that there is a merest and faintest whisper about any of the ingredients to constitute an offence under Section 420 of IPC. On over all scrutiny of the material, it cannot be said that offence under section 420 has been made out against the petitioners. On overall view of the matter, this Court is of the opinion that no offence under section 420 has been committed by the petitioners.

20. In the case of Zahir Ahmed (supra), a question arose before the Calcutta High Court as to framing of charge under section 420 of IPC in a case of applying for false trade description etc., or selling goods to which false trade mark or false trade description is applied. The Calcutta High Court has answered it in negative. In para 12 of the reported decision, it is observed as under:

"Sadly for the opposite parties, there is not the merest and faintest whisper about any of the aforesaid ingredients within the four corners of the F.I.R. The F.I.R. being, what it is, no case for an offence punishable under S.420, I.P.C. could be said to have been made out as such. And, as held by a learned single Judge of Karnataka High Court in Syed Kaleem v. Mysore Lakshmi Beedi Works, 1993 Cri.LJ 232, in view of

Ss.78 and 79 of the Trade and Merchandise Marks Act, 1958 providing penalty for applying false trade descriptions etc., and selling goods to which a false trade mark or false trade description is applied, as alleged in the relevant case before us, a charge under S.420, I.P.C. becomes wholly inapt, I fully concur with the said view."

21. Applying the principle laid down by the Calcutta High Court in above referred to decision to the facts of the instant case and as observed in earlier paragraph of this judgment, element to constitute the offence under Section 420 of IPC is absent and considering from the overall view of the matter and considering from any angle, this Court finds that the petitioners have not committed offence under Section 420 of IPC and other offences are non-cognizable offences and, therefore, registration of FIR against them by the PI is nothing but an abuse of process of law and the PI has registered malicious and vexatious complaint against the petitioners without any prima facie case made out against them to harass them on vendetta and, therefore, the impugned FIR is required to be quashed and set aside by allowing the petition.

22. For the foregoing reasons, the petition succeeds and accordingly it is allowed. Resultantly, FIR No.23 of 2000 registered with Kapodra Police Station by the complainant against the petitioners for the commission of alleged offences under Sections 420, 483, 484, 485, 487 and 488 of IPC and Section 135 of the Act is hereby quashed and set aside. Rule is made absolute.

(A.M. Kapadia, J.)

(karan)